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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

ELECTRONIC FRONTIER FOUNDATION, Plaintiff, v. OFFICE OF THE DIRECTOR OF NATIONAL INTELLIGENCE, Defendant,	No. C 07-5278 SI **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** HEARING ON MOTION FOR SUMMARY JUDGMENT Date: March 7, 2008 Time: 9:00 a.m.

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff in this case, the Electronic Frontier Foundation, challenges the decision of the Office of the Director of National Intelligence to withhold records under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. Plaintiff's requests seek records regarding ODNI's communications with members of Congress and telecommunications companies about proposed amendments to the Foreign Intelligence Surveillance Act. ODNI released approximately 500 pages of records responsive to plaintiff's requests and, as relevant to the present motion, withheld only 13 pages of exempt material. The withheld documents consist of highly sensitive classified slides that were used to brief members of Congress regarding national security matters and a classified telephone message slip containing the thoughts and mental impressions of an ODNI attorney. The detailed declarations accompanying this memorandum demonstrate the dangers to the national security that could result if ODNI is compelled to disclose these documents. Further, these declarations establish that ODNI has properly withheld the documents because the message slip is not an "agency record" under the FOIA and because the documents are protected from disclosure pursuant to FOIA exemptions (b)(1), (3), (5) and/or (6). For these reasons, ODNI hereby seeks summary judgment under Federal Rule of Civil Procedure 56 with respect to the withholding of these documents.

BACKGROUND

Office of the Director of National Intelligence. The defendant in this FOIA action is the Office of the Director of National Intelligence ("ODNI"). The position of Director of National Intelligence ("DNI") was created in 2004 by Congress in the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 1011(a) and 1097, 118 Stat. 3638, 3643-63, 3698-99 (2004) (amending sections 102 through 104 of the Title I of the National Security Act of 1947). The Director of National Intelligence serves as the head of the United States Intelligence Community and as the principal advisor to the President, the National Security Council, and the Homeland Security Council, for intelligence-related matters related to national security. *See* 50 U.S.C. §§ 403(b)(1), (2).

The responsibilities and authorities of the Director of National Intelligence are set forth

in the National Security Act, as amended. *See* 50 U.S.C. § 403-1. These responsibilities include, *inter alia*, ensuring that national intelligence is provided to the President, the heads of the departments and agencies of the Executive Branch, the Chairman of the Joint Chiefs of Staff and senior military commanders, and the Senate and House of Representatives and committees thereof. *See* 50 U.S.C. § 403-l(a)(1). The amendments to the National Security Act also created an Office of the Director of National Intelligence, which assists the DNI in carrying out his duties and responsibilities under the law. *See* 50 U.S.C. § 403-3.

Foreign Intelligence Surveillance Act. Congress enacted the Foreign Intelligence Surveillance Act ("FISA"), as amended, 50 U.S.C. §§ 1801-1811, in 1978 to "provide a procedure under which the Attorney General can obtain a judicial warrant authorizing the use of electronic surveillance in the United States for foreign intelligence purposes." S. Rep. No. 95-604, 95th Cong. 2d 5, reprinted at 1978 U.S.C.C.A.N. 3906. In 1994, the statute was amended to permit applications for orders authorizing physical searches as well as electronic surveillance. 50 U.S.C. §§ 1821-1829.

FISA Modernization Debate. In April 2007, in response to a request from Congress, the DNI proposed amendments to the FISA designed to update it with changes in telecommunications technology that have taken place since 1978. *See* Fiscal Year 2008 Intelligence Authorization Act, *available at* http://intelligence.senate.gov/hearings.cfm?hearingid=2643&witnessId=6412. Among other provisions, the DNI proposed amendments to the FISA that would provide retroactive immunity to electronic communication service providers that are alleged to have assisted the Government with intelligence activities following the September 11, 2001 attacks. Since 2005, numerous lawsuits have been filed throughout the United States challenging the legality of the Government's intelligence gathering activities since September 11, 2001. *See, e.g., In re NSA Telecommunications Records Litigation* (MDL Docket No. 06-1791 VRW). The plaintiff in this FOIA action, the Electronic Frontier Foundation, is one of the lead counsel in this litigation. *See* Complaint ¶ 10 n.1.

The DNI's proposal to amend the FISA led to significant legislative debate during the

Spring and Summer of 2007. Various committees of Congress held hearings on the issue of FISA modernization and the DNI played an active role in this process, including testifying before Congress on several occasions. *See* Declaration of John Hackett ¶ 7 (attached as Exhibit A) (hereinafter "Hackett Decl.").

On August 5, 2007, the President of the United States signed the Protect America Act of 2007 ("PAA"), a law that created temporary amendments to the FISA for a period of six months. *See* Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552. Although the PAA amended the FISA in several important ways, it did not include retroactive liability protection to electronic communication service providers alleged to have assisted the Government's intelligence gathering activities. *See id.* Since the passage of the PAA, the debate regarding permanent FISA modernization and liability protection has continued in Congress. *See, e.g.*, Hearing Before the United States Senate Committee on the Judiciary, *FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability*, 100th Cong. (Oct. 31, 2007), *at* http://judiciary.senate.gov/hearing.cfm?id=3009. Most recently, with the PAA set to expire on February 1, 2008, Congress passed, and the President signed, a temporary extension to the PAA that will keep the law in force through February 16, 2008, while Congress considers permanent amendments to the FISA. *See* Dan Egan, *Surveillance Law Extended For 15 Days*, WASHINGTON POST, A5, February 1, 2008.

Plaintiff's FOIA Requests. By letters dated August 31, 2007, plaintiff submitted two FOIA requests to ODNI for the following documents: "all agency records from April 2007 to the present concerning briefings, discussions, or other exchanges that Director McConnell or other ODNI officials have had with": a) "members of the Senate or House of Representatives"; and b) "representatives of telecommunications companies concerning amendments to FISA [Foreign Intelligence Surveillance Act, 50 U.S.C. § 1801 *et seq.*, as amended], including any discussion of immunizing telecommunications companies or holding them otherwise unaccountable for their role in government surveillance activities." *See* Hackett Decl. ¶ 8. Plaintiff's letters also sought expedited processing of its FOIA requests pursuant to 32 C.F.R. § 1700.12(c)(2), asserting that the public has a significant interest in ODNI's efforts to amend the FISA. *See* Hackett Decl. ¶ 9.

On September 11, 2007, ODNI sent plaintiff two separate response letters acknowledging receipt of plaintiff's FOIA requests and granting expedited processing for both requests. *See id.* ODNI also informed plaintiff that the requests would be processed as soon as practicable. *See id.*

Plaintiff filed its complaint in this action under the FOIA on October 17, 2007, seeking expedited processing and release of the records that plaintiff requested from ODNI in its two FOIA requests. *See* Complaint For Injunctive Relief (dkt. no. 1). On October 29, 2007, plaintiff filed a motion for preliminary injunction (dkt. no. 6) seeking a Court order to compel ODNI to complete processing of its FOIA requests. *See* Plaintiff's Proposed Order. ODNI opposed plaintiff's motion. *See* Defendant's Opposition To Plaintiff's Motion For Preliminary Injunction (dkt. no. 22). On November 27, 2007, the Court granted plaintiff's motion in part and denied it in part. *See* Order (dkt. no. 26). The Court ordered that ODNI provide an interim release of responsive records on November 30, 2007 and a final release no later than December 10, 2007. *Id.* The Court also ordered ODNI to provide "an affidavit with its final response setting forth the basis for withholding any responsive documents it does not release." *Id.*

Pursuant to the Court's order, ODNI provided plaintiff with an interim release of responsive records on November 30, 2007. ODNI released 242 pages of responsive records, 230 of which were disclosed in full, and twelve of which were withheld in part pursuant to 5 U.S.C. § 552(b)(2). These records consisted of correspondence between ODNI and members of Congress, attachments to that correspondence, and official statements by the DNI during congressional hearings. The information withheld in part from these records consisted exclusively of non-public ODNI fax numbers and telephone numbers. *See* Hackett Decl ¶ 15.

On December 10, 2007, ODNI provided a final release of responsive records as well as a declaration from John Hackett, ODNI's Director of the Information Management Office, explaining the basis for its withholdings. ODNI released an additional 267 pages of responsive records consisting of correspondence between ODNI and members of Congress, attachments to that correspondence, and statements by the DNI during congressional hearings. 238 of these pages were unclassified records that were released in full, twenty-eight pages containing

classified information were withheld in part pursuant to 5 U.S.C. §§ 552(b)(1) & (3), and one page containing a non-public ODNI telephone number was withheld in part pursuant to 5 U.S.C. § 552(b)(2). *See* Hackett Decl ¶ 16.

ODNI withheld only fourteen pages of responsive records in full. First, ODNI withheld eleven pages of classified briefing materials (*i.e.*, Power Point slides) used by the DNI to brief members of Congress, in classified setting, regarding national security and intelligence matters. These records were withheld pursuant to 5 U.S.C. §§ 552(b)(1) and (3). Second, ODNI withheld a one-page personal hand-written note from a member of Congress to the ODNI General Counsel because it is not an agency record under the FOIA and because it qualifies for withholding under 5 U.S.C. § 552 (b)(6). Third, ODNI withheld a telephone message slip that contains the handwritten personal notes and mental impressions of an ODNI employee. This document was withheld because it is not an agency record under the FOIA and it qualifies for withholding pursuant to 5 U.S.C. §§ 552(b)(1), (3), (5) & (6). *See* Hackett Decl ¶ 17.

Scope Of The Dispute In This Case. As explained in the Joint Case Management Statement (dkt. no. 32), the parties have agreed to narrow significantly the disputed legal issues in this case. Plaintiff challenges only the withholding of the following documents: 1) eleven pages of classified briefing materials (*i.e.*, Power Point slides) used by the DNI to brief members of Congress regarding national security and intelligence matters; and 2) the classified telephone message slip that contains the handwritten personal notes and mental impressions of an ODNI employee. As explained below, ODNI is entitled to summary judgment with respect to these withholdings.

ARGUMENT

I. ODNI IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S FOIA CLAIMS.

The FOIA's "basic purpose" reflects a "general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 152 (1989). "Congress recognized, however, that public disclosure is not always in the public interest." *Central Intelligence Agency v. Sims*, 471 U.S. 159, 167 (1985). The FOIA is designed to achieve a "workable balance between the right of the

public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy." *John Doe*, 493 U.S. at 152 (quoting H.R. Rep. No. 1497, 89th Cong., 2 Sess. 6 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2416, 2423).

To that end, FOIA mandates disclosure of government records unless the requested information falls within one of nine enumerated exceptions, *see* 5 U.S.C. § 552(b). "A district court only has *jurisdiction* to compel an agency to disclose *improperly withheld* agency records," *i.e.*, records that do "not fall within an exemption." *Minier v. Central Intelligence Agency*, 88 F.3d 796, 803 (9th Cir. 1996) (emphasis by the court); *see also Kissinger v. Reporters Comm. for Freedom of the Press*, 445 U.S. 136, 150 (1980) ("Under 5 U.S.C. § 552(a)(4)(B)[,] federal jurisdiction is dependent upon a showing that an agency has (1) 'improperly' (2) 'withheld' (3) 'agency records.'"). Despite the "liberal congressional purpose" of FOIA, the statutory exemptions must be given "meaningful reach and application." *John Doe*, 493 U.S. at 152. "Requiring an agency to disclose exempt information is not authorized by FOIA." *Minier*, 88 F.3d at 803 (quoting *Spurlock v. Fed. Bureau of Investigation*, 69 F.3d 1010, 1016 (9th Cir. 1995)).

The Government bears the burden of proving that the withheld information falls within the exemptions it invokes. 5 U.S.C. § 552(a)(4)(b). Where, as here, responsive records are withheld, "[c]ourts are permitted to rule on summary judgment . . . solely on the basis of government affidavits describing the documents sought." *Lion Raisins v. USDA*, 354 F.3d 1072, 1082 (9th Cir. 2004). All that is required is that "the affiants [be] knowledgeable about the information sought" and that "the affidavits [be] detailed enough to allow the court to make an independent assessment of the government's claim." *Id.* The court may award summary judgment to an agency on the basis of information provided in affidavits or declarations that describe "the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemptions, and show that the justifications are not controverted by contrary evidence in the record or by evidence of . . . bad faith." *Hunt v. Central Intelligence Agency*, 981 F.2d 1116, 1119 (9th Cir. 1992). "'If the affidavits contain reasonably detailed descriptions of the documents and allege facts sufficient to

establish an exemption, the district court need look no further.'" *Citizens Commission on Human Rights v. Federal Drug Administration*, 45 F.3d 1325, 1329 (9th Cir. 1995) (quoting *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987)).

In evaluating the applicability of FOIA exemptions for purposes of deciding the summary judgment motion in this case, the Court must be mindful that the information sought by plaintiff implicates national security, an area where the Executive Branch's judgment is due "the utmost deference" from the Judicial Branch. *See Department of Navy v. Egan*, 484 U.S. 518, 530 (1988). Both the Supreme Court and the Court of Appeals for the Ninth Circuit have specifically recognized the courts must give "great deference" to the Executive in the context of FOIA claims that implicate national security. *Sims*, 471 U.S. at 179; *Berman v. Central Intelligence Agency*, 501 F.3d 1136, 1140 (9th Cir. 2007). Indeed, courts have routinely and repeatedly emphasized that "weigh[ing] the variety of subtle and complex factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the [nation's] intelligence-gathering process" is a task best left to the Executive Branch and not attempted by the judiciary. *Sims*, 471 U.S. at 180; s*ee Center for Nat'l Security Studies v. U.S. Dept. of Justice*, 331 F.3d 918, 926 (D.C. Cir. 2003), *cert. denied*, 540 U.S. 1104 (2004) ("the judiciary is in an extremely poor position to second-guess the executive's judgment in this area of national security."). Accordingly, the Court must give substantial weight to agency determinations regarding national security. *See Berman*, 501 F.3d at 1143; *Hunt*, 981 F.2d at 119; *Hiken v. Department of Defense*, 521 F. Supp. 2d 1047, 1056 (N.D. Cal. 2007).

Given these standards of review, the discussion below and the accompanying declarations demonstrate that the documents withheld by ODNI plainly fall within exemptions to FOIA's disclosure requirements or are otherwise outside the scope of the FOIA.

II. ODNI CONDUCTED AN ADEQUATE SEARCH FOR RESPONSIVE RECORDS.

To obtain summary judgment on the issue of the adequacy of the records search, an agency must "conduct a search reasonably calculated to uncover all relevant documents." *Citizens Comm'n*, 45 F.3d at 1328 (9th Cir. 1995) (internal quotations omitted). "[A]ffidavits describing agency search procedures are sufficient for purposes of summary judgment . . . if they

are relatively detailed in their description of the files searched and the search procedures, and if they are nonconclusory and not impugned by evidence of bad faith." *Citizens Comm'n*, 45 F.3d at 1328.

In determining the sufficiency of a search, "the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was *adequate*." *Citizens Comm'n*, 45 F.3d at 1328 (court's emphasis). In general, the sufficiency of a search is determined by the "appropriateness of the methods" used to carry it out, "not by the fruits of the search." *Iturralde v. Comptroller of the Currency*, 315 F.3d 311, 315 (D.C. Cir. 2003). Accordingly, "the agency's failure to turn up a particular document, or mere speculation that as yet uncovered documents might exist, does not undermine the determination that the agency conducted an adequate search for the requested records." *Wilbur v. CIA*, 355 F.3d 675, 678 (D.C. Cir. 2004). In the absence of "countervailing evidence" or "substantial doubt," agency affidavits or declarations describing a reasonable and adequate search are sufficient to demonstrate an agency's compliance with FOIA. *See Iturralde*, 315 F.3d at 314 (citations omitted).

ODNI has conducted an appropriate search in this case. As described in the attached declaration of John Hackett, ODNI's Director of Information Management (IMO), after ODNI granted expedited processing of plaintiff's requests, the IMO examined how the requests should be handled, including where searches should be performed within the ODNI. *See* Hackett Decl. ¶ 10. The IMO identified all offices within ODNI likely to possess records responsive to plaintiff's requests. *Id.* Searches were conducted in the following ODNI offices: the ODNI Executive Secretariat, the Office of the Director and his staff, the Office of General Counsel, the Office of Legislative Affairs, and the Office of the Deputy Director of National Intelligence For Collection. *Id.* Given the nature and scope of plaintiff's requests, no other offices within ODNI would reasonably be expected to possess responsive documents. *Id.*

The ODNI Executive Secretariat serves as the DNI's focal point for the receiving, handling, and intra-agency distribution of internal and external correspondence. *Id.* ¶ 11. It reviews and distributes official DNI and Principal Deputy Director of National Intelligence

(PDDNI) internal and external correspondence that goes through the Executive Secretariat for principal review, approval, or signature, and maintains hard copies to those records. *Id.* The ODNI's Executive Secretariat performed a search for records responsive to plaintiff's requests and located official correspondence between the DNI and members of Congress. *Id.* The Executive Secretariat maintains an electronic database that serves as an index to the corresponding hardcopy case files. *Id.* This electronic database covers all of the correspondence handled by the Executive Secretariat. *Id.* The Executive Secretariat searched this database, as well as its Microsoft Word share drive, using the terms "FISA," "FISA Amendment" and "Telecommunication." *Id.*

Notices regarding plaintiff's request were also sent to individuals in the Office of the Director, the Office of General Counsel, the Office of Legislative Affairs, and the Office of the Deputy Director of National Intelligence For Collection, as well as some former members of these Offices. *Id.* ¶ 12. These Offices were selected for search because their duties and responsibilities are such that it was reasonably likely that individual employees within these offices would have been involved in ODNI's FISA modernization effort. *Id.* All of these individuals were provided with a copy of plaintiff's request letters and were asked to search their electronic and hard copy files in order to locate records responsive to plaintiff's requests. *Id.* After these individuals performed their searches they either forwarded responsive records or advised the IMO that they did not locate any responsive records. *Id.* As the records were located and forward to the IMO, the FOIA analyst handling this case conducted a continual analysis and review of the documents located. *Id.* ¶ 13. Review of these records did not suggest that searching additional components or offices within ODNI would reasonably be expected to locate additional responsive documents. *Id.*

For these reasons, ODNI's search was reasonably calculated to identify documents responsive to plaintiff's requests and ODNI is entitled to summary judgment.

III. ODNI PROPERLY WITHHELD THE BRIEFING SLIDES

A. ODNI Properly Withheld the Briefing Slides Under Exemption 3.

The classified briefing slides were properly withheld pursuant to Exemption 3 of the

FOIA.

Exemption 3 permits the withholding of information "specifically exempted from disclosure" by a statute "refer[ring] to particular types of matters to be withheld." 5 U.S.C. § 552(b)(3). In examining an Exemption 3 claim, a court must determine first whether the claimed statute is a statute of exemption under FOIA, and second, whether the withheld material satisfies the criteria of the exemption statute. *See Sims*, 471 U.S. at 167; *Minier*, 88, F.3d at 801.

When Congress has enacted statutes that particularly identify certain categories of information that are exempt from public disclosure notwithstanding the requirements of the FOIA, Congress makes "manifest" its intent to require the withholding of documents falling within the terms of those statutes. *Fitzgibbon v. Central Intelligence Agency*, 911 F.2d 755, 761 (D.C. Cir. 1990); *see also id.* at 764 ("exemption statutes were congressionally designed to shield processes at the very core of the intelligence agencies – intelligence-collection and intelligence-source evaluation"). Under Exemption 3, a withholding agency "need not demonstrate disclosure . . . will damage national security." *Weiner v. FBI*, 943 F.2d 972, 983 n.18. (9th Cir. 1991). By enacting a specific withholding statute, Congress already "decided that disclosure of [the specified information] is potentially harmful." *Hayden v. National Security Agency*, 608 F.2d 1381, 1390 (D.C. Cir. 1979). Thus, "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statute's coverage." *Fitzgibbon*, 911 F.2d at 761-62 (internal quotations omitted).

1. Applicable Exemption 3 Statutes

Three withholding statutes are applicable to the briefing slides withheld by ODNI. First, Section 6 of the National Security Agency Act of 1959, Pub. L. No. 86-36, § 6, 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note, provides:

> [N]othing in this Act or any other law . . . shall be construed to require the disclosure of the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency.

It is well-established that Section 6 "is a statute qualifying under Exemption 3." *The Founding*

Church of Scientology of Washington, D.C., Inc. v. Nat'l Security Agency, 610 F.2d 824, 828 (D.C. Cir. 1979); *see also Lahr v. National Transp. Safety Bd.*, 453 F. Supp. 2d 1153, 1171-72 (C.D. Cal. 2006). Section 6 reflects a "congressional judgment that in order to preserve national security, information elucidating the subjects specified ought to be safe from forced exposure." *Church of Scientology*, 610 F.2d at 828. In enacting Section 6, Congress was "fully aware of the 'unique and sensitive' activities of the [NSA] which require 'extreme security measures.'" *Hayden*, 608 F.2d at 1390 (citing legislative history). Thus, "[t]he protection afforded by section 6 is, by its very terms, absolute. If a document is covered by section 6, NSA is entitled to withhold it. . . ." *Linder v. Nat'l Security Agency*, 94 F.3d 693, 698 (D.C. Cir. 1996).

Second, the National Security Act of 1947 as amended by Section 102A(i)(1) of the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (Dec. 17, 2004), codified at 50 U.S.C. § 403-1(i)(1), requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." The Court of Appeals for the Ninth Circuit has concluded that the National Security Act of 1947, as amended, is a withholding statute for purposes of Exemption 3. *See Berman*, 501 F.3d at 1140. Indeed, in the context of the FOIA, the Ninth Circuit has described the National Security Act as providing the DNI with "sweeping power" and "very broad authority to protect all sources of intelligence information from disclosure." *Berman*, 501 F.3d at 1140 (quoting *Sims*, 471 U.S. at 168-69); *see also id.* ("We have acknowledged that after *Sims*, there exists a near-blanket FOIA exemption" for intelligence sources and methods.).

The third applicable statute is 18 U.S.C. § 798. This statute prohibits, on pain of criminal penalty, the disclosure of various kinds of classified information, including information "concerning the communications intelligence activities of the United States." *Id.* Specifically, 18 U.S.C. § 798(a) provides, in pertinent part, that

> Whoever knowingly and willfully communicates, furnishes, transmits or otherwise makes available to an unauthorized person, or publishes, or uses in any manner prejudicial to the safety or interest of the United States . . . any classified information . . . (3) concerning the communications intelligence activities of the United States . . . shall be fined under this title or imprisoned for not more than ten years, or both.

Id. The term "communications intelligence" means "all procedures and methods used in the interception of communications and the obtaining of information from such communications by other than the intended recipients." *Id.* § 798(b). This statute clearly identifies matters to be withheld from the public and refers to particular types of matters to be withheld. *See* 5 U.S.C. § 552(b)(3). Thus, this statute qualifies as an Exemption 3 statute under the FOIA. *See People for the American Way Foundation ("PFAW") v. Nat'l Security Agency*, 462 F. Supp. 2d 21, 28 (D.D.C. 2006); *Florida Immigrant Advocacy Ctr. v. Nat'l Security Agency*, 380 F. Supp. 2d 1332, 1340 (S.D. Fla. 2005); *Winter*, 569 F. Supp. at 548.

2. The Briefing Slides Fall Within the Scope of Exemption 3.

In this case the briefing slides withheld by ODNI are squarely within the scope of the Exemption 3 statutes that ODNI has invoked. The attached declaration of Rhea Siers of the National Security Agency explains how compelled disclosure of the documents would harm national security and reveal important information about the United States' intelligence sources and methods.[1] *See* Declaration of Rhea Siers (attached as Exhibit B) (hereinafter "Siers Decl.").

ODNI has withheld two sets of nearly identical classified briefing materials (*i.e.*, Power Point slides) titled "FISA Modernization" that were used to brief members of Congress regarding national security and intelligence matters. *See* Siers Decl. ¶ 10. The first set is five pages and it is classified as SECRET//NOFORN. *Id.* The second set is similar to the first set – the first five pages contain the same slides, but the second set has one additional page consisting of statistical information on the NSA's targeting for foreign intelligence collection. *Id.* The second set of slides is classified as TOP SECRET//COMINT//NOFORN. *Id.* These briefing slides contain highly sensitive information discussing how the NSA collects communications, including information about the specific types of communications collected and the transmission paths of these communications. *Id.* ¶ 11. Further, the information contained on these slides reveals the intelligence sources and methods that NSA uses to collect communications. *Id.* ¶ 20.

[1] Because the information in the briefing slides originated with the National Security Agency, that agency has submitted a declaration explaining the basis for the withholding. *See* Hackett Decl. ¶ 20.

As described in the Siers Declaration, one of the NSA's primary missions is to intercept communications in order to obtain foreign intelligence information necessary to the national defense, national security, and foreign affairs of the United States.[2] *Id.* ¶ 4. These intelligence gathering methods include collection of signals intelligence ("SIGINT"), which is information derived from foreign electromagnetic signals. *Id.* The briefing slides at issue in this case discuss important aspects of the NSA's SIGINT and intelligence gathering capabilities. *Id.* ¶ 20. This information goes to the core of the NSA's mission, as it specifically discusses the NSA's organization, functions, activities, and the process by which intelligence information is collected. *Id.*; *see Hayden*, 608 F.2d at 1389 ("signals intelligence is one of the NSA's primary functions"; and the release of information related to SIGINT collection would "disclose information with respect to [NSA] activities, since an intercepted communication concerns an NSA activity"). Consequently, the slides fall squarely within the scope of Section 6, which requires the withholding of information related to "any function of the National Security Agency, or any information with respect to the activities thereof,"[3] as well as the National Security Act and 18 U.S.C. § 798. *See PFAW*, 462 F. Supp. 2d at 29 (affirming NSA decision to withhold "briefing slides" that detail intelligence capabilities and activities).

B. ODNI Properly Withheld the Briefing Slides Under Exemption 1.

The briefing slides withheld by ODNI pursuant to Exemption 3 are also properly withheld pursuant to Exemption 1 of the FOIA.[4]

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[2] For additional information about the NSA's mission and intelligence functions, *see* Siers Decl. ¶¶ 3-9.

[3] Under Section 6, the NSA need only show that information "concerns a specific NSA activity and that its disclosure would reveal information integrally related to that activity." *Lahr*, 453 F. Supp. 2d at 1192. No showing need be made concerning the particular security threats posed by the release of the information. *Id.*

[4] In both *Miner* and *Hunt*, the Ninth Circuit upheld the CIA's withholding of information concerning intelligence sources and methods based on the National Security Act and found it unnecessary to decide whether FOIA Exemption 1 was also applicable. *Minier*, 88 F.3d at 800 n.5; *Hunt*, 981 F.2d at 1118. Likewise here, Exemption 3 clearly encompasses the briefing slides at issue, and there is no need to consider the applicability of additional exemptions. This section nevertheless explains that Exemption 1 also applies to the documents and supplies an additional

Exemption 1 allows an agency to protect records that are: "(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and (B) are in fact properly classified pursuant to Executive Order." *See* 5 U.S.C. § 552 (b)(1). In short, under Exemption 1 material that has been properly classified is exempt from disclosure. *See Weiner*, 943 F.2d at 979.

The Executive Order applicable to the documents at issue in this case is Executive Order ("E.O.") 12,958, "Classified National Security Information," as amended by E.O. 13,292. *See* 68 Fed. Reg. 15315 (Mar. 28, 2003). Under section 1.1(a) of E.O. 12958, information may be classified if the following conditions are met:

> (1) an original classification authority is classifying the information;
>
> (2) the information is owned by, produced by or for, or is under the control of the United States Government;
>
> (3) the information falls within one or more of the categories of information listed in section 1.4 of this order; and
>
> (4) the original classification authority determines that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage.

E.O. 12958, § 1.1 (a). Two categories of information that may be properly classified under the E.O., both of which are applicable to this case, are "intelligence activities (including special activities), intelligence sources or methods, or cryptology," and "vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection systems relating to national security, which includes defense against transnational terrorism." E.O. 12958, § 1.4 (c), (g).

As discussed above, in reviewing national security classification determinations under Exemption 1, the Ninth Circuit has emphasized that, like the Exemption 3 analysis, "substantial weight" must be accorded to agency affidavits concerning the classified status of the records at issue. *Weiner*, 943 F.2d at 980; *see also Halperin v. CIA*, 629 F.2d 144, 148 (D.C. Cir. 1980) (stating that the "court is not to conduct a detailed inquiry to decide whether it agrees with the agency's opinions; to do so would violate the principle of affording substantial weight to the

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grounds on which to grant summary judgment in ODNI's favor.

expert opinion of the agency.").

With regard to the briefing slides, the NSA has submitted a declaration from a TOP SECRET classification authority confirming that the slides meet the criteria for classification as set forth in subparagraphs (c) and (g) of Section 1.4 of Executive Order 12958, as amended. *See* Sires Decl. ¶¶ 1, 12-15. Specifically, the slides reveal sensitive sources and methods of the NSA's intelligence operations, including how the NSA collects communications, information and statistics about the specific types of communications collected, and the transmission paths of these communications. Sires Decl. ¶¶ 13-15. Accordingly, the information in the slides is properly classified at the SECRET and TOP SECRET levels, which means that unauthorized disclosure reasonably could be expected to cause serious and exceptionally grave damage to the national security, respectively.[5] *Id.* ¶¶ 14-15.

The Siers declaration also explains in sufficient detail why disclosure of the information in the slides will result in damage to the national security. Public disclosure of the slides would reveal information regarding the types of communications NSA collects and how it collects such communications. *Id.* ¶ 15. This information would allow adversaries of the United States to accumulate information and draw conclusions about the NSA's technological capabilities, sources, and methods. *Id.* Disclosure would thus provide these adversaries with a road map to the NSA's intelligence capabilities, thereby educating them as to which of their communication modes remain safe or are successfully defeating the NSA's capabilities. *Id.* Further, public disclosure of information about the NSA's intelligence capabilities could easily alert potential intelligence targets to the vulnerabilities of their communications and would encourage them implement countermeasures. *Id.* ¶ 8. If a target is successful in defeating the NSA's targeting efforts, all of the intelligence from that source would be lost and the government officials that rely on that information – military, national policymakers, intelligence community – would have to operate and make decisions without that information. *Id.* ¶ 9. Such losses are extremely harmful to national security, to say nothing of the significant cost and effort that would be

[5] The Siers Declaration also explains that no portion of the slides can be meaningfully segregated so as to release non-exempt material. Siers Decl. ¶ 11.

required to implement new intelligence gathering technology to replace the methods compromised by public disclosure. *Id.* ¶¶ 7, 9.

For these reasons, ODNI is entitled to summary judgment with respect to its withholding of the briefing slides.

IV. ODNI PROPERLY WITHHELD THE TELEPHONE MESSAGE SLIP

A. The Telephone Message Slip Is Not An Agency Record Under The FOIA.

The telephone message slip that contains the handwritten personal notes and mental impressions of an ODNI attorney is not an agency record under the FOIA.

To qualify as an "agency record" subject to the FOIA, two conditions must be satisfied: (1) "an agency must either create or obtain the requested materials," and (2) "the agency must be in control of the requested materials at the time the FOIA request is made." *United States Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 142 (1989); *see also Baizer v. Department of the Air Force*, 887 F. Supp. 225, 227 (N.D. Cal. 1995) ("Both possession and control by an agency are therefore required for materials to fall within the FOIA."). ODNI concedes the first prong of this test and agrees that an ODNI employee created the phone message slip at issue in this case, but ODNI disputes that it possess the requisite degree of "control" over the phone message slip for it to fall within the scope of the FOIA.

With respect to the "control" prong of the analysis, courts have focused on "a variety of factors surrounding the creation, possession, control and use of the document by an agency." *Bureau of National Affairs, Inc. v. United States Dep't of Justice ("BNA")*, 742 F.2d 1484, 1490 (D.C. Cir. 1984); *see Baizer*, 887 F. Supp at 227-28. These factors include: "whether the document was generated within the agency, has been placed into the agency's files, is in the agency's control, and has been used by the agency for an agency purpose." *BNA*, 742 F.2d at 1493; *see Baizer*, 887 F. Supp. at 227-28 (citing *BNA*); *Grand Central Partnership v. Cuomo*, 166 F.3d 473, 479 (2d Cir. 1999) (relying on *BNA*); *Sibille v. Federal Reserve Bank of New York*, 770 F. Supp. 134, 138 (S.D.N.Y 1991) ("courts have followed the lead of *BNA* in deeming agency or personal use to be an important element in determining whether documents created by agency personnel are agency records."). In particular, courts in both the Ninth and D.C. Circuits

have "focused on how the agency used the requested material." *Baizer*, 887 F. Supp. at 228; *see Consumer Federation of America v. Department of Agriculture*, 455 F.3d 283, 290-91 (D.C. Cir. 2006); *BNA*, 742 F.2d at 1492. At bottom, however, the central inquiry when considering the totality of these factors is "whether, when an employee creates a document, that creation can be attributed to the agency under the FOIA." *BNA*, 742 F.2d at 1492.

Importantly, the Supreme Court has emphasized that "the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency." *See Tax Analysts*, 492 U.S. at 144. Employing agency resources, standing alone, is not sufficient to render a document an agency record. *See Gallant v. NLRB*, 26 F.3d 168, 172 (D.C. Cir. 1994); *BNA*, 742 F.2d at 1493 (documents subject to the FOIA must be "agency records" and "not an employee's record that happens to be located physically within an agency"). Records may be personal both "in the sense of not related to agency business and in the sense of being utilized by only one individual." *Cuomo*, 166 F.3d at 480. Indeed, "the use of documents solely for personal convenience strongly reinforces the conclusion that disputed documents are not agency records subject to the FOIA." *Washington Post v. Dep't. of State*, 632 F. Supp. 607, 615 (D.D.C. 1986). "In short, documents are typically not agency records under the Act unless and until they are included within material controlled, created, approved and utilized by the agency itself." *Judicial Watch v. Clinton*, 880 F. Supp. 1, 11 (D.D.C. 1995), *aff'd on other grounds* 76 F.3d 1232 (D.C. Cir. 1996).

Applying this distinction between personal and agency records, courts have consistently held that documents such as telephone message slips and personal notes of government employees are not agency records subject to the FOIA. *See BNA* at 1495 (telephone message slips intended for personal use, not placed in agency files, not relied on by any other agency official, and where employee had freedom to dispose at any time were not agency records); *Fortson v. Harvey*, 407 F. Supp. 2d 13, 15-16 (D.D.C. 2005) (notes taken by government employee investigating equal opportunity complaint are not agency records where no agency obligation on employee to keep such notes, the notes were not relied upon by other agency personnel, employee stored notes in personal folder, notes not integrated into agency's general

system of records, and employee used notes only to refresh recollection); *Bloomberg v. SEC*, 357 F. Supp. 2d 156, 166 (D.D.C. 2004) (telephone message slip and personal notes taken by government employee during an agency meeting are not agency records because they were intended for personal use of government employee, not circulated to other agency employees, not relied on by agency, and not incorporated into agency files); *Clinton*, 880 F. Supp. at 11 (telephone logs, calendar markings and personal staff notes intended for personal use and not incorporated into the agency's record keeping system are not agency records); *Sibille*, 770 F. Supp. at 138 (handwritten notes of meetings and telephone conversations created for the personal convenience of government employees that were not circulated within the agency, not stored with agency records and not accessible by others within the agency are not agency records); *Inner City Press/Community on the Move v. Board of Governors of Federal Reserve System*, 1998 WL 690371 at *6 (S.D.N.Y. 1998) (notes taken by government attorney during telephone call with two outside companies are not agency records where the notes were taken on the lawyer's own initiative and, although the notes were in furtherance of his official duties, the lawyer neither shared them with other agency employees nor placed them in agency files); *Kalmin v. Dep't of Navy*, 605 F. Supp. 1492, 1494-95 (D.D.C. 1986) (personal notes created by government employee are not agency records because notes were made for the sole purpose of refreshing the writer's memory, maintained in writer's personal files, never circulated to other agency employees, never under the agency's control, and could have been discarded at will in the writer's sole discretion); *Marriott Employees' Federal Credit Union v. National Credit Union Admin.*, 1996 WL 33497625 at *7 (E.D. Va. 1996) (handwritten and computer notes that were created by agency employees for their personal use and to assist them in the performance of their official duties by cataloguing meetings, contacts and conversations for future reference, not incorporated into the agency's files, not made available to or accessible by others, and not created for an agency purpose are not agency records); *AFGE, Local 2782 v. Dep't of Commerce*, 632 F. Supp. 1272, 1277 (D.D.C. 1986) (personal notes and logs, "although undoubtedly work-related" and created by an employee for the purpose of "facilitat[ing] her own performance of her duties" are not agency records); *Miranda Manor, Ltd. v. Dep't of Health and*

Human Services, 1986 WL 4426 at *2-3 (N.D. Ill. 1986) (notes taken by government employee during official licensing inspection of nursing home are not agency records because employee voluntarily created the notes to refresh memory, notes were not circulated among agency staff, and employee was free to discard notes at any time).

Applying these factors to the present case, the ODNI phone message slip is not an agency record under the FOIA. As explained in the Hackett declaration, the message slip is a personal record because (1) it was prepared for the personal convenience of an ODNI attorney, (2) it did not circulate to anyone other than the attorney's assistant within the agency, (3) it was kept in the attorney's personal files and not in any agency files, (4) it was not used by the agency to conduct official business, (5) the attorney was not instructed or otherwise required to make or keep the slip, and (6) the attorney was free to retain or discard the slip at any time. *See* Hackett Decl. ¶¶ 22-25.

The message slip at issue in this case resulted from an incoming telephone call intended for an ODNI attorney. Hackett Decl. ¶ 23. The attorney's assistant received the call and completed a standard message form by noting the caller's name, the caller's phone number, the date and time of the call, and checked the box "please call." *Id.* ¶¶ 22-23. The secretary provided the message slip to the ODNI attorney and the attorney returned the telephone call. *Id.* ¶ 23. During that telephone conversation, the attorney wrote notes on the blank lines on the bottom of the message slip as well as on the back side of the slip. *Id.* These handwritten personal notes consist of the attorney's mental impressions during the phone call, as well as attorney work product and deliberative information. *Id.*

The message slip was created by an administrative assistant voluntarily and purely for the personal use and convenience of an ODNI attorney in order to advise that person of a missed telephone call. *Id.* ¶ 24. The notes written on the slip were intended only to later refresh the memory of the attorney regarding the telephone conversation and the attorney's mental impressions of that conversation. *Id.* The message slip was not created to satisfy any agency-imposed requirement or obligation. *Id.* Neither the attorney nor the assistant were under any agency directive to create the telephone message slip and ODNI does not have a formal

agency policy regarding the creation, storage, or disposal of telephone message slips. *Id.* Indeed, the ODNI attorney was under no obligation to maintain this message slip and could have disposed of it at any time. *Id.*

Furthermore, the message slip was not integrated into the ODNI official filing system but rather was kept in the attorney's personal files.[6] *Id.* ¶ 25. No copies of the slip were made, it was not stored electronically in any fashion, and it was not integrated into a computer network accessible by other ODNI employees. *Id.* Other than the attorney's assistant, who initially took the message, the slip was not accessible by other employees within the agency and it was not shared with or circulated to any other ODNI employees. *Id.*; *see BNA*, 742 F.2d at 1496-97 (holding that appointment calendar prepared by employee's secretary but not otherwise circulated to agency employees is not agency record). The slip was not used by the agency to conduct official business nor was it used as part of any official decision-making. Hackett Decl. ¶ 25. No other agency employee used or relied on the information on this message slip to conduct agency business. *Id.* Consequently, and consistent with the case law discussed above, this document is not an agency record subject to the FOIA.

B. The Telephone Message Slip Was Properly Withheld Under Exemption 5.

Even assuming the telephone message slip is an agency record, it is protected from disclosure pursuant to FOIA Exemption 5, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The exemption covers documents "normally privileged in the civil discovery context." *National Labor Relations Bd. v. Sears, Robuck & Co.*, 421 U.S. 132, 149 (1975); *see Carter v. U.S. Dep't of Commerce*, 307 F.3d 1084, 1088 (9th Cir. 2002). In this case the civil discovery privileges at issue are the attorney work-product doctrine and the deliberative process privilege.

The Attorney Work Product Doctrine. The attorney work product doctrine protects from disclosure "documents and tangible things prepared by a party or his representative in

[6] The slip was kept on the attorney's desk for a number of weeks before being placed into one of the attorney's unofficial miscellaneous files pertaining to the FISA. Hackett Decl. ¶ 25.

anticipation of litigation." *In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management)*, 357 F.3d 900, 906 (9th Cir. 2004). These documents include "the files and the mental impressions of an attorney . . . reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways." *Hickman v. Taylor*, 329 U.S. 495, 510-11 (1947). The doctrine, thus, protects information generated by legal counsel where "the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[7] *In re Grand Jury Subpoena*, 357 F.3d at 907; *see Feshbach v. SEC*, 5 F. Supp. 2d 774, 782 (N.D. Cal. 1997).

Disclosure of the information in the message slip would reveal the mental impressions and thought processes of the attorney who wrote the notes. Hackett Decl. ¶ 27. In this instance a government lawyer made certain handwritten notations during a conversation with a representative of a telecommunications company.[8] *Id.* This document was most certainly prepared because of the prospect of litigation, specifically the lawsuits against the Government and various telecommunications companies pending in the Northern District of California challenging the legality of the Government's intelligence gathering activities since September 11, 2001, including challenges to the Government's compliance with the FISA. *Id.*; s*ee In re NSA Telecommunications Records Litigation* (MDL Docket No. 06-1791 VRW). Additionally, the Government anticipates ongoing constitutional and legal challenges to its intelligence activities and specific challenges to the Protect America Act as well as any permanent amendments to the FISA. Hackett Decl. ¶ 27. Disclosure of this information would severely hamper the adversarial process as attorneys at ODNI working on litigation or anticipating litigation would no longer feel free to write down important thoughts on cases for fear that the information might be publicly disclosed to their adversaries. *Id.* Further, such disclosure is

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[7] Because the work product doctrine in the FOIA context is absolute, "there is no obligation to segregate factual from deliberative material where documents are withheld pursuant to the attorney work product privilege." *Feshbach*, 5 F. Supp. 2d at 783.

[8] The message slip meets the "inter-agency or intra-agency "threshold criteria for Exemption 5 because it is an internal agency document created by an ODNI employee that was never transmitted outside the agency. Hackett Decl. ¶ 26.

particularly problematic in this case because EFF is one of the lead counsel in the litigation related to the creation of the attorney's notes. *Sears*, 421 U.S. at 143 (stating that FOIA's primary purpose was not to benefit private litigants or to substitute for civil discovery). For the work product doctrine to have vitality, attorneys must be permitted to "work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel," and to "assemble information, sift what [they] consider[ ] to be the relevant from the irrelevant facts, prepare [their] legal theories and plan [their] strateg[ies] without undue and needless interference." *Hickman*, 329 U.S. at 510-11; *In re Sealed*, 146 F.3d 881, 884 (D.C. Cir. 1998) ("Without a strong work-product privilege, lawyers would keep their thoughts to themselves, avoid communicating with other lawyers, and hesitate to take notes.").

The Deliberative Process Privilege. In addition, the notes written by the attorney on telephone message slip are protected from disclosure by the deliberative process privilege. Records are covered by that privilege if they are "predecisional in nature" and form "part of the agency's deliberative process." *Maricopa Audubon Soc'y v. U.S. Forest Serv.*, 108 F.3d 1089, 1092 (9th Cir. 1997) (internal quotations omitted). "A predecisional document is one prepared in order to assist an agency decisionmaker in arriving at his decision, and may include recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency." *Id.* at 1093. "As a general matter, notes taken by government officials often fall within the deliberative process privilege." *Baker & Hostetler v. Dep't of Commerce*, 473 F.3d 312, 321 (D.C. Cir. 2006). "Notes generally are selective and deliberative – and routine public disclosure of meeting notes and other notes would hinder government officials from debating issues internally, deter them from giving candid advice, and lower the overall quality of the government decisionmaking process." *Id.*

The notes on the phone message slip are protected by the deliberative process privilege because it contains the handwritten mental deliberations of its author. *See* Hackett Dec. ¶ 28. In this case an ODNI attorney wrote down certain notes during the course of a telephone conversation. *Id.* These notes reflect this attorney's thoughts and mental impressions regarding

the conversation in order to later refresh the attorney's memory. *Id.* The notations on this document are pre-decisional and deliberative as they relate to the ongoing discussions regarding FISA modernization, the Protect America Act, and the pending litigation discussed above. *Id.* These informal and unofficial handwritten notations contain no final decisions, but instead reflect a government lawyer's thoughts and mental impressions regarding a telephone conversation. *Id.* Disclosure of this type of deliberative materials would inhibit government employees from writing notes of their conversations, thereby hindering the overall quality of government decisionmaking.[9] *Id.*; *see Judicial Watch of Florida v. Dep't of Justice*, 102 F. Supp. 2d 6, 12-13 (D.D.C. 2000) (holding that Attorney General's hand written notes are protected from disclosure by deliberative process privilege).

C. The Telephone Message Slip Was Properly Withheld Under Exemptions 1 & 3.

ODNI also withheld certain portions of the telephone message slip under Exemptions 1 & 3. The attached declaration of Lieutenant General of Ronald L. Burgess, Jr. (attached as Exhibit C) (hereinafter "Burgess Decl."), who is an original classification authority, explains that certain information on the message slip is currently and properly classified as TOP SECRET under subparagraphs (c) and (g) of Section 1.4 of Executive Order 12958, as amended. As noted above, the Court must give "substantial weight" to the agency's determinations regarding national security issues. *See, e.g.*, *Berman*, 501 F.3d at 1140.

The handwritten notes on the slip contain the ODNI attorney's mental impressions of a

[9] The FOIA requires that any "reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt." 5. U.S.C. § 552(b). Because the phone message slip is not an agency record under the FOIA, it is not necessary to segregate any portions of it. Even assuming it is considered to be an agency record, the attorney work-product doctrine protects the entire document from disclosure. *Feshbach*, 5 F. Supp. 2d at 783. Furthermore, even assuming the Court disagrees with these positions, the attorney's notes on the slip are protected by the deliberative process privilege for the reasons discussed above and the factual portions of the slip, such as the name and phone number of the caller, as well as the name of the ODNI attorney, are protected from disclosure under FOIA exemption 6 because disclosure of this factual information would be an unwarranted invasion of personal privacy. *See* Hackett Decl. ¶ 29-30; 5 U.S.C. § 552(b)(6). Additionally, as discussed further below, certain portions of information on the slip are classified and exempt from disclosure under Exemption 1 & 3.

conversation with a representative of a telecommunication company. Burgess Decl. ¶ 5. The issues discussed during the conversation focused on the various options that are available to address the litigation facing the telecommunications carriers. *Id.* As noted above, this litigation consists of civil lawsuits based on the telecommunication carriers' alleged involvement in United States Government intelligence activities. *Id.* The ODNI attorney and the caller discussed issues such as court orders and legislation. *Id.*

No further information about the contents of this message slip can be disclosed without revealing classified information as well as the information protected from disclosure under FOIA Exemptions 3, 5, and 6. *Id.* Recognizing this difficult position for the Government in national security FOIA cases, the Ninth Circuit has noted the tension between "justifying the applicability of the exemption with sufficient specificity to permit [the plaintiff] meaningfully to challenge it" and the Government's "need to avoid providing a description that is so specific that it risks disclosing protected sources and methods." *Berman*, 501 F.3d at 1142; *see Hiken*, 521 F. Supp. 2d at 1058 ("Providing more detailed descriptions may subvert the purpose of the exemption."). Any further public details about the contents of the message slip would tend to confirm the existence or non-existence of a relationship with a telecommunications carrier, which is currently and properly classified. Burgess Decl. ¶ 5. Disclosure of such information would harm the national security. Specifically, if ODNI were to release information that would tend to confirm the existence or non-existence of a relationship with a particular telecommunications carrier, then this fact would allow individuals, including adversaries of the United States, to accumulate information and draw conclusions about how the United States Government collects communications, its technical capabilities and its sources and methods of collection. *Id.* ¶ 6. Confirmation by ODNI that the Government does or does not have a relationship with a particular telecommunications carrier for an intelligence activity would provide adversaries of the United States with a road map, instructing them which communications modes and personnel remain safe or are successfully defeating the Government's capabilities. *Id.* For example, if ODNI were to admit publicly in response to an information request that no relationship with telecommunications companies A, B, and C exists, but in response to a separate information

request about company D state only that no response could be made, this would give rise to the inference that the Government has a relationship with company D. *Id.* Over time, the accumulation of these inferences would disclose the capabilities (sources and methods) of the Government's intelligence activities and inform adversaries of the United States of the degree to which the Government can successfully exploit particular communications. *Id.* Adversaries can then develop countermeasures to thwart the Government's abilities to collect their communications. *Id.* Accordingly, release of this information or providing any further public description of its contents would reveal Top Secret information that could reasonably be expected to cause exceptionally grave harm to national security.[10] *Id.* ¶ *9; see Berman*, 501 F.3d at 1142-43 (upholding CIA declaration where more specific response might allow foreign intelligence agents to determine contours of intelligence operations, sources, and methods).

For these same reasons, the classified information in the message slip is also protected from disclosure under Exemption 3.[11] *See* Burgess Decl. ¶¶ 10-11. Disclosure of this information is prohibited by the National Security Act of 1947 as amended, which requires the Director of National Intelligence to "protect intelligence sources and methods from unauthorized disclosure." *See* 50 U.S.C. § 403-1(i)(1); *See* Burgess Decl. ¶¶ 10-11. Accordingly, release of any additional information in the message slip, beyond that which is described above, would inappropriately reveal sensitive intelligence sources and methods.

CONCLUSION

For the reasons stated herein, ODNI is entitled to summary judgment.

Dated: February 5, 2008 Respectfully submitted,

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[10] In the event ODNI's various arguments for withholding the message slip and briefing slides are not accepted by the Court on the current public record, ODNI reserves the right to provide more detailed explanations for the withholding pursuant to Exemptions 1 and 3 by way of an *in camera, ex parte* classified submission to the Court. *See, e.g., Pollard v. F.B.I.*, 705 F.2d 1151, 1153-54 (9th Cir. 1983).

[11] *See supra* note 4 (noting that the classification of sources and methods information is irrelevant for purposes of the statutory protection afforded under Exemption 3).

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